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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
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13 LEBLANC NUTRITIONS, INC.,

14 Plaintiff,

NO. CIV. S-05-0581 FCD JFM

15 v.

16 ADVANCED NUTRA LLC,

17 Defendant.

MEMORANDUM AND ORDER

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20 Plaintiff, LeBlanc Nutritions ("plaintiff"), filed a
21 complaint alleging intentional misrepresentation, negligent
22 misrepresentation, negligence, breach of contract, breach of
23 implied warranties, and violation of the Federal Food, Drug, and
24 Cosmetic Act ("FDCA"), 21 U.S.C. § 301, et seq. This matter is
25 before the court on motion by defendant, Advanced Nutra LLC
26 ("defendant"), to dismiss the complaint, or, in the alternative,
27 to dismiss Claims One, Two, Three, Five and Six. For the reasons
28 set forth below, the court grants defendant's motion to dismiss

1 Claim Six based on the FDCA, and denies the motion in all other
2 respects.¹

3 **FACTUAL BACKGROUND**

4 Plaintiff, a Japanese corporation, is an importer, exporter,
5 and purchaser of certain manufactured food additives and cosmetic
6 products. (Pl.'s Compl. ¶ 7.) In late 2004, plaintiff purchased
7 300 kilograms of a product represented to be Ubidecarenone, an
8 active enzyme, from defendant. (Pl.'s Compl. ¶ 11.) Global
9 Distribution Inc. ("Global") served as plaintiff's broker,
10 facilitating plaintiff's purchase of the product.² (Pl.'s Compl.
11 ¶¶ 8, 12.) Defendant required payment of the more than
12 \$500,000.00 purchase price prior to delivery. (Pl.'s Compl. ¶¶
13 7, 14.)

14 After receiving full payment, defendant shipped the product
15 from California to plaintiff in Japan. (Pl.'s Compl. ¶¶ 16, 17.)
16 Documentation shipped with the product indicated that the product
17 delivered was ninety-nine percent pure Ubidecarenone. (Pl.'s
18 Compl. ¶¶ 19-21.) Based on this documentation and defendant's
19 representations, plaintiff resold the product as Ubidecarenone to
20 its customers in Japan. (Pl.'s Compl. ¶ 18.) However, according
21 to the complaint, the product defendant delivered to plaintiff
22 was not, in fact, Ubidecarenone. (Pl.'s Compl. ¶ 24.)

25 ¹ Because oral argument will not be of material
26 assistance, the court orders this matter submitted on the briefs.
27 E.D. Cal. Local Rule 78-230(h).

28 ² Pursuant to Fed. R. Civ. P. 12(b)(6), all factual
allegations from the complaint are taken as true.

1 Plaintiff's customers notified plaintiff that the product
2 was not Ubidecarenone. (Id.) They continue to return the
3 product to plaintiff and request information about the identity
4 of the product they purchased and used. (Pl.'s Compl. ¶ 25.)
5 Plaintiff has in turn requested the information from defendant,
6 who has refused to provide it. (Pl.'s Compl. ¶ 25.)

7 Plaintiff filed a complaint on March 24, 2005 which alleges
8 claims for: 1) intentional misrepresentation of the product as
9 Ubidecarenone; 2) negligent misrepresentation; 3) negligence in
10 representing, identifying, testing, packaging and handling of the
11 product defendant sold as Ubidecarenone; 4) breach of contract
12 based on defendant providing a product not contracted for in lieu
13 of Ubidecarenone; 5) breach of implied warranties by defendant in
14 providing a product inferior to Ubidecarenone; and 6) violation
15 of the FDCA, based on the misbranding of the product as
16 Ubidecarenone.

17 On April 18, 2005, defendant filed the instant motion to
18 dismiss the complaint in its entirety based on plaintiff's
19 failure to attach specified documents to the complaint and
20 plaintiff's lack of legal standing in California to bring an
21 action. In the alternative, defendant seeks dismissal of: 1)
22 Claims One, Two, and Three because plaintiff cannot recover in
23 tort for purely economic losses; 2) Claim Five based on the lack
24 of privity to support breach of implied warranty claims; and 3)
25 Claim Six because the FDCA does not create a private right of
26 action.

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STANDARD

A complaint may be dismissed under Fed. R. Civ. P. 12(b)(6)³ for: (1) lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. Smilecare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996). A complaint will not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his [or her] claim that would entitle him [or her] to relief." Yamaguchi v. Dept. of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997) (quoting Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996)). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963).

Nevertheless, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United

³ Unless otherwise stated, further references to a "Rule" are to the Federal Rules of Civil Procedure.

1 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
2 Cir. 1986).

3 In ruling on a motion to dismiss, the court may consider
4 only the complaint, any exhibits thereto, and matters which may
5 be judicially noticed pursuant to Fed. R. Evid. 201. See Mir v.
6 Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988);
7 Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12
8 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

9 **ANALYSIS**

10 **1. Failure to Attach Documents to the Complaint**

11 Defendant argues that plaintiff's complaint provides
12 insufficient facts to state a cognizable legal claim because it
13 failed to attach to the complaint copies of, inter alia, the
14 sales documentation, brokerage agreement, and proof of payment.

15 However, nothing in the Federal Rules of Civil Procedure
16 requires plaintiff to attach any document to the complaint. To
17 satisfy federal notice pleading, plaintiff need only provide a
18 "short and plain statement of the claim showing that the pleader
19 is entitled to relief." Rule 12(b)(6); see Leatherman v. Tarrant
20 County Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)
21 (noting that the "liberal system of 'notice pleading' does not
22 require detailed factual pleadings."). A plaintiff in federal
23 court is not expected to "plead his evidence or specific factual
24 details." Gibson v. United States, 781 F.2d 1334, 1340 (9th Cir.
25 1986) (internal quotations omitted). Accordingly, defendant's
26 motion to dismiss for failure to attach documents to the
27 complaint is DENIED.

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2. **Lack of Standing Based on Cal. Corp. Code §§ 2105, 2203**

Defendant next contends that plaintiff, as a foreign corporation, does not have standing to maintain this action because it did not obtain a certificate of qualification as required by Cal. Corp. Code §§ 2105 and 2203.

The California Corporations Code restricts foreign corporations from transacting intrastate business without having first obtained a certificate of qualification from the California Secretary of State. Cal. Corp. Code § 2105. To obtain the certificate of qualification, a corporation must identify its state of incorporation, place of business, and principal office within California; designate an agent for service of process; and consent to such service of process. Id. A foreign corporation conducting intrastate business that does not register can be restricted from maintaining any action or proceeding based upon that business. Cal. Corp. Code § 2203(c).⁴

⁴ Cal. Corp. Code § 2203(c) provides:

"A foreign corporation ... which transacts intrastate business without complying with Section 2105 shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this state, commenced prior to compliance with Section 2105, until it has complied with the provisions thereof and has paid to the Secretary of State a penalty of two hundred fifty dollars (\$250) in addition to the fees due for filing the statement and designation required by Section 2105 and has filed with the clerk of the court in which the action is pending receipts showing the payment of the fees and penalty and all franchise taxes and any other taxes on business or property in this state that should have been paid for the period during which it transacted intrastate business.

1 A defendant who seeks to challenge a plaintiff's standing
2 under Cal. Corp. Code §§ 2105 and 2203 may do so by motion to
3 dismiss for lack of standing. The defendant, as moving party,
4 bears the burden to prove that: 1) the action arose out of
5 plaintiff's transaction of intrastate business; and 2) the action
6 was commenced prior to plaintiff qualifying to transact
7 intrastate business. United Sys. of Ark., Inc. v. Stamison, 63
8 Cal. App. 4th 1001, 1007 (3d Dist. 1998), (following United Med.
9 Mgmt. Ltd. v. Gatto, 49 Cal. App. 4th 1732, 1740 (2d Dist.
10 1996)); McMillan Process Co. v. Brown, 33 Cal. App. 2d 279, 284
11 (3d Dist. 1996). If the defendant prevails in challenging
12 standing, plaintiff's action may be dismissed or stayed pending
13 compliance with Cal. Corp. Code § 2203. United Med., 49 Cal.
14 App. 4th at 1740.

15 Defendant has failed to demonstrate that plaintiff was
16 required to comply with Cal. Corp. Code §§ 2105 and 2203 prior to
17 filing its complaint. Specifically, defendant failed to offer
18 any evidence that plaintiff engaged in intrastate business
19 triggering the obligation to obtain a certificate of
20 qualification in accordance with Cal. Corp. Code § 2105. For
21 purposes of qualification under that section "'transact[ing]
22 intrastate business' means entering into repeated and successive
23 transactions of its business in this state, other than interstate
24 or foreign commerce." Cal. Corp. Code § 191(a). Plaintiff's
25 complaint alleges that plaintiff entered into two transactions,
26 *between California and Japan*. (Pl.'s Compl. ¶¶ 11, 22.) Courts
27 have found similar transactions were not intrastate for the
28 purposes of Cal. Corp. Code §§ 2105 and 2203. See Cal. Corp.

1 Code § 191(c)(6) ("Soliciting or procuring orders where such
2 orders require acceptance without the state to become contracts
3 does not constitute transacting intrastate business."); Thorner
4 v. Selective Cam Transmission Co., 180 Cal. App. 2d 89 (1st Dist.
5 1960) (finding no intrastate business even when negotiations are
6 carried out within the state by an agent of a foreign
7 corporation, if the final acceptance of the offer is made outside
8 the state). Accordingly, the court DENIES defendant's motion to
9 dismiss based on plaintiff's lack of standing.

10 **3. Restriction on Tort Claims in the Commercial Code**

11 Plaintiff alleges tort claims for intentional
12 misrepresentation, negligent misrepresentation, and negligence
13 against defendant due to its allegedly false representations that
14 the product supplied was Ubidecarenone. Defendant contends that
15 plaintiff's tort claims must be dismissed because plaintiff prays
16 for solely economic relief.

17 As a general rule, solely economic losses are not
18 recoverable in tort. S.M. Wilson & Co. v. Smith Intl., Inc., 587
19 F.2d 1363, 1376 (9th Cir. 1978); Seely v. White Motor Co., 63
20 Cal. 2d 9, 18 (1965). However, California courts recognize
21 numerous to this general rule. Aas v. Superior Court, 24 Cal.
22 4th 627, 643 (2000) (allowing recovery in tort for a contract
23 breach where an independent duty was violated); J'Aire Corp. v.
24 Gregory, 24 Cal. 3d 799 (1979) (allowing recovery for solely
25 economic loss where the risk of harm was foreseeable and where
26 privity was lacking with defendant); Walker v. Signal Co., 84
27 Cal. App. 3d 982, 994-997 (4th Dist. 1978) (allowing the
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1 possibility of recovery in contract cases if defendant
2 fraudulently induced plaintiff to enter into contract).

3 However, the court does not need to delve into the
4 intricacies and exceptions to tort recovery for pure economic
5 loss, since plaintiff's complaint can be construed to allege more
6 than solely economic damages. The complaint alleges that "[i]n
7 addition, LeBlanc has suffered other damages not yet
8 ascertained." (Pl.'s Compl. §§ 45, 59, 78.) The court can
9 reasonably infer from these averments that plaintiff seeks more
10 than solely economic damages, including possible injury to
11 property, employees, or customers caused by the unidentified
12 product. See Yamaguchi, 109 F.3d at 1480; Retail Clerks, 373
13 U.S. at 753 (finding reasonable inferences must be given to
14 allegations in complaint).

15 Additionally, under Rule 8(e)(2), plaintiff is entitled to
16 set forth multiple claims upon which "alternatively or
17 hypothetically" relief could be based. Claims can be pled in the
18 alternative "regardless of the consistency and whether based on
19 legal, equitable or maritime ground." Rule 8(e)(2). "When two
20 or more statements are made in the alternative and one of them if
21 made independently would be sufficient, the pleading is not made
22 insufficient by the insufficiency of one or more of the
23 alternative statements." Id.

24 Here, plaintiff is entitled to plead in the alternative,
25 particularly given defendant's contentions that privity is
26 lacking between plaintiff and defendant. (Mot. to Dismiss 7:3-
27 7). California courts permit negligence claims based on solely
28 economic loss between commercial litigants not in privity when

1 the harm to the plaintiff is foreseeable. Frank M. Booth, Inc.
2 v. Reynolds Metals Co., 754 F. Supp. 1441 (E.D. Cal. 1991); See
3 J'Aire Corp., 24 Cal. 3d at 799. Thus, if it were determined, as
4 defendant alleges, that there is no basis for contractual relief,
5 plaintiff clearly would be entitled to seek relief in tort.

6 Accordingly, the court DENIES defendant's motion to dismiss
7 Claims One, Two, and Three.

8 **4. Lack of Privity**

9 Plaintiff alleges that defendant breached implied warranties
10 of merchantability and fitness by providing a product inferior to
11 Ubidecarenone. Defendant contends that this claim must be
12 dismissed because there is no privity between plaintiff and
13 defendant.

14 California has adopted the Uniform Commercial Code's implied
15 warranty provisions. Cal. Com. Code § 2315. Under these
16 provisions, "[v]ertical privity is a prerequisite in California
17 for recovery on the theory of breach of implied warranties of
18 fitness and merchantability." U.S. Roofing, Inc. v. Credit
19 Alliance Corp., 228 Cal. App. 3d 1431, 1441 (3d Dist. 1991).
20 Vertical privity generally requires a direct contractual nexus
21 between plaintiff and defendant for a claim of breach of implied
22 warranty to succeed. Osbourne v. Subaru of America, Inc., 198
23 Cal. App. 3d 646, 656 n.6 (3d Dist. 1988).

24 Here, the complaint sets forth facts sufficient to allege
25 privity. Specifically, the complaint alleges that "LeBlanc
26 agreed in late 2004 to *purchase from Advanced Nutra* 300 kilograms
27 of Ubidecarenone, an active enzyme, for resale to LeBlanc's
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1 customers in Japan." (Pl.'s Compl. ¶ 11 (emphasis added)). In
2 deciding a motion to dismiss, "[a]ll allegations of material fact
3 are taken as true and construed in the light most favorable to
4 the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d
5 336, 337-38 (9th Cir. 1996). Thus plaintiff's allegations are
6 sufficient to survive a motion to dismiss. Accordingly, the
7 court DENIES defendant's motion to dismiss Claim Five.

8 **5. No Private Action under the FDCA**

9 In Claim Six, plaintiff alleges that defendant violated the
10 FDCA by misbranding the product it represented as Ubidecarenone.
11 Defendant moves to dismiss this claim on the grounds that
12 Congress did not create a private right of action in the FDCA.

13 The FDCA provides that "all such proceedings for the
14 enforcement, or to restrain violations, of this chapter shall be
15 by and in the name of the United States [or by a state in certain
16 circumstances]" 21 U.S.C. §§ 332(a), 337. "Courts have
17 generally interpreted this provision to mean that no private
18 right of action exists to redress alleged violations to the
19 FDCA." Summit Tech., Inc. v. High-line Med. Instruments Co., 922
20 F. Supp. 299, 304 (S.D. Cal. 1996); See also In re: Orthopedic
21 Bones Screw Prods. Liab. Litig., 159 F.3d 817, 824 (3d Cir. 1998)
22 ("It is ... well established that Congress has not created an
23 express or implied private cause of action for violation of the
24 FDCA."); PDK Labs., Inc. v. Friedlander, 103 F.3d 1105, 1113 (2d
25 Cir. 1997), (holding plaintiff's suit "represents an
26 impermissible attempt to enforce the FDCA through a private right
27 of action"); Gile v. Optical Radiation Corp., 22 F.3d 540, 544
28 (3d Cir. 1994), cert. denied, 115 S. Ct. 429 (1994) (citing Pac.

1 Trading Co. v. Wilson & Co., 547 F.2d 367, 370 (7th Cir. 1976)
2 ("violations of the FDCA do not create private rights of
3 action")); Mylan Lab., Inc. v. Matkari, 7 F.3d 1130, 1139 (4th
4 Cir. 1993), cert. denied, 114 S. Ct. 1307 (1994) (same); Ginochio
5 v. Surikos, Inc. 864 F. Supp. 948, 956 (N.D. Cal. 1994) (citing
6 various courts that have held "there is no private cause of
7 action for violation of the [FDCA]"); see also Fielder v. Clark,
8 714 F.2d 77, 79 (9th Cir. 1983) (holding that the court lacked
9 subject matter jurisdiction based on 21 U.S.C. § 337 because a
10 "private party suing in his own name [has] no jurisdiction under
11 the Act").

12 As a private party, plaintiff cannot maintain an action
13 under the FDCA. Accordingly, the court GRANTS defendant's motion
14 to dismiss Claim Six for violation of the FDCA.

15 **CONCLUSION**

16 For the foregoing reasons:

- 17 1. Defendant's motion to dismiss Claim Six under Federal Food,
18 Drug and Cosmetic Act is GRANTED.
19 2. In all other respects defendant's motion to dismiss is
20 DENIED.
21 3. The parties shall file a joint status conference statement
22 on or before August 1, 2005.

23 IT IS SO ORDERED

24 Dated: June 14, 2005.

25
26 /s/ Frank C. Damrell Jr.
27 FRANK C. DAMRELL, Jr.
28 UNITED STATES DISTRICT JUDGE